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NO. 81-5152

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR,

PETITIONER

v.

STATE OF ALABAMA,

RESPONDENT

ON THE WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Was the evidence of Petitioner's fingerprints and confession admissible under the Fourth Amendment and the rule in *Dunaway v. New York*, 442 U.S. 200 (1979)?

2. If this Court finds the evidence of Petitioner's fingerprints and confession was inadmissible, should this evidence then be admissible under an "objective good-faith belief" exception to the exclusionary rule?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

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NO. 81-5152

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OMAR TAYLOR,

Petitioner

v.

STATE OF ALABAMA,

Respondent

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT

OPINIONS BELOW

1. The opinion of the Alabama Court of Crimina' Appeals is reported as *Taylor v. State*, 399 So. 2d 875 (1981), and is found in the Joint Appendix at page 25.

2. The opinion of the Alabama Supreme Court is reported as *Taylor v. State*, 399 So. 2d 881 (1981), and is found in the Joint Appendix at page 37.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). It is Respondent's position that this Court is without jurisdiction to consider the admissibility of the fingerprint evidence since this issue was not addressed in

the opinion of the Court of Criminal Appeals and although mentioned was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

On December 2, 1978, Omar Taylor and two accomplices committed an armed robbery of Moseley's Grocery in Montgomery, Alabama. This was one of a series of robberies that had occurred within a short period of time in the same area of Montgomery. When the investigating officers processed the crime scene, they obtained latent fingerprints from a package of weiners and a bag of sugar one of the robbers had placed on the check-out counter just prior to the taking of the money. Also, the police officers had a description of the robber as a black male between twenty and twenty-five years old, about five feet six inches in height and weighing about a hundred and forty-five to a hundred and fifty pounds. (R. 39).

On December 22, 1978, Charles Martin was arrested in a separate case on charges of rape and robbery that had occurred in the same neighborhood. Martin was known to Detective Mobley as a suspect in the robbery of Moseley's Grocery. (J.A. 11). During the following week Mobley talked to Charles Martin on several occasions and developed a rapport with him. (J.A. 10). Martin told Detective Mobley that he knew that Omar Taylor was one of those involved in the robbery of Moseley's Grocery. (R. 15).

Charles Martin desperately needed help and Detective Mobley assured him that his cooperation would be brought to the attention of the court if his information proved reliable. He also impressed upon Martin the consequences of giving untruthful information. (J.A. 10). Mobley had not received any previous information from Martin.

Unable to verify the information and convinced of the accuracy of it, Detective Mobley instructed Detective Alford to arrest Omar Taylor. On January 4, 1979, at about 3:00 p.m. Detectives Alford and Rutland made a warrantless arrest of Taylor at a pool hall. The officers identified themselves and advised Taylor that he was under arrest for

the robbery of Moseley's Grocery.

Detective Alford advised Taylor of his *Miranda* rights but did not interrogate him. (R. 20). Taylor was taken to the jail where he was fingerprinted, photographed, interrogated briefly for about fifteen or twenty minutes and then placed in a cell.

Later, Omar Taylor was taken from his cell and placed in a lineup where Mrs. Moseley was unable to identify him. He was returned to his cell where he remained until after a fingerprint expert compared Taylor's fingerprint card with the latent prints from the crime scene and determined positively that Taylor was one of the three robbers. Taylor was confronted with this evidence, but he denied any knowledge of the robbery when questioned by Detective Wilson. Prior to the interrogation Wilson again advised Taylor of his *Miranda* rights. (R. 33).

The Moseley Grocery robbery was assigned to Detective Hicks. That night he examined the file folder and got Taylor out of his cell to be interrogated. At this time Taylor had been in jail for almost six hours, most of which time had been spent in the solitude of his cell.

Detective Hicks read Taylor his *Miranda* rights. Taylor, a high school graduate, then read the rights form and signed it. (R. 28 and 58). Hicks had been talking to Taylor for five or ten minutes when Taylor's girlfriend and a neighbor, Charles Williams, arrived on the scene. (R. 31). According to the testimony of Detective Hicks, Taylor's girlfriend came to the Detectives and stated she wanted to see him. When Taylor was told she was outside, he wanted to see her and Detective Hicks allowed the girlfriend, the neighbor, and Taylor to confer in private. (R. 35 and 136).

After this conference, Taylor confessed to his participation in the robbery of Moseley's Grocery and identified his two accomplices as Charles Martin, the informant, and Larry Davis. (R. 128).

During the trial Petitioner moved to exclude the evidence of the fingerprint comparison and moved to suppress the confession in light of *Dunaway v. New York*, 442 U.S. 200 (1979). The trial court excluded the fingerprints taken

after Petitioner's arrest. Petitioner was fingerprinted during the trial and those prints were admitted into evidence. During the trial the judge admitted Taylor's confession as he found there were enough factors to distinguish his case from *Dunaway*. (R. 116).

The Court of Criminal Appeals reviewed the trial court's admission of the confession following an arrest based on less than probable cause and on May 27, 1980, reversed and remanded the case in light of *Dunaway*.

On February 27, 1981, the Alabama Supreme Court reversed the appellate court after finding that the taint of an illegal arrest had been attenuated by certain factors. Petitioner's application for rehearing was denied on April 10, 1980, and the petition for a writ of certiorari was filed before the U.S. Supreme Court on July 27, 1981, one hundred and seven days later. The writ was granted on November 2, 1981.

SUMMARY OF THE ARGUMENT

Respondent contends this Court is without jurisdiction to consider the admissibility of the fingerprint evidence. The Alabama Court of Criminal Appeals addressed the one issue of the admissibility of a voluntarily given confession following an arrest based on less than probable cause. The Alabama Supreme Court reviewed the appellate court's decision, and although reference was made to the fingerprints, the admissibility of this evidence was never expressly passed on by the Alabama Supreme Court.

The existance of the sufficiency of probable cause for the arrest presents a close question. The officers had a detailed description of the suspect, a set of latent fingerprints from the crime scene, and information from a jail inmate who desperately needed help in exchange for reliable information and who was known to the officers as one of three suspects in the Moseley Grocery robbery.
Petitioner in his confession later named the informant as one of his accomplices. Although reliability of the informant may not have been adequately developed at the suppression hearing, the officers had reason to believe the

informant was speaking as a participant and eye-witness to the crime. Even if the officers lacked probable cause, they were acting in good faith and their belief had an objective reasonable basis.

If this Court should find that the arrest was based on less than probable cause, when the facts are considered it is evident that the Alabama Supreme Court correctly held Petitioner's confession was admissible in light of *Dunaway v. New York*, 442 U.S. 200 (1979). Under the three factors set forth the taint of his arrest was sufficiently attenuated to permit the admission of the incriminating evidence. The time period between the arrest and confession was six hours, the majority of which was spent in the solitude of his cell where he could compose his thoughts. There were numerous intervening circumstances. The *Miranda* rights were read to him on three occasions. He was placed in a lineup where the victim was unable to identify him. Petitioner spent a lengthy period of time in the solitude of his cell and prior to his confession was permitted to confer in private at his request with his girlfriend and neighbor. There was no flagrant violation of constitutional rights by the police. When arresting the defendant for the robbery, the officers were acting in good faith and there was an objective reasonable basis for such a belief even if the probable cause was technically deficient.

As applied now there is no flexibility within the exclusionary rule regardless of the degree of police error. Honest mistakes on the part of police officers are treated in exactly the same way as flagrant violations of Fourth Amendment rights. This Court should adopt as an exception to the exclusionary rule, the admission of evidence where the police, though mistaken, have an objective good faith belief that their action was proper. There must be an objective, reasonable basis for such a belief. Should the Court find Petitioner's fingerprints and confession evidence otherwise inadmissible, this evidence should be admissible under this exception to the exclusionary rule.

ARGUMENT

I.

EVIDENCE OF THE DEFENDANT'S FINGERPRINTS AND CONFESSION WERE ADMISSIBLE UNDER THE FOURTH AMENDMENT AND THE RULE IN *DUNAWAY v. NEW YORK.*

A. The Question Of The Admissibility Of The Fingerprint Comparison Evidence Was Not Addressed By The Court Of Appeals And Was Not Expressly Reviewed By The Alabama Supreme Court.

The one issue reviewed by the Alabama Court of Criminal Appeals as stated in their opinion (J.A. 25) was:

> "Appellant filed a pre-trial motion seeking to have his confession suppressed and his arrest declared illegal. A full blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied."

The appellate court considered the admissibility of the confession *only* and reversed in light of *Dunaway v. New York*, 442 U.S. 200 (1979) and *Brown v. Illinois*, 442 U.S. 590 (1975).

Although the Alabama Supreme Court referred to the issue under review as involving fingerprints and the confession, the Supreme Court did nothing more than review the opinion of the appellate court, reverse the decision in light of the attenuation factors as set forth in *Dunaway*, and point out the harshness of the exclusionary rule.

Where the issue of the admissibility of the fingerprint comparison was not addressed by the appellate court and not expressly reviewed by the State Supreme Court, a jurisdictional question is raised. In *Street v. New York*, 349 U.S. 576 (1969) it was held that where a question is not presented to the State courts in such a manner that it is decided by the

highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

B. The Arrest of Taylor Was Based On Probable Cause Or The Officers Acted In A Good Faith Belief Grounded In Objective Reasonableness.

Code of Alabama 1975, §15-10-3 gives an officer authority to arrest without a warrant when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed it. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

In discussing probable cause in *Brinegar* at pages 176-177. Mr. Justice Rutledge stated:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officers' whim or caprice.

The robbery of Moseley's Grocery by three men was but one of a series of armed robberies that had occurred within a short period of time in the same area of Montgomery. When the investigating officers processed the crime scene, they obtained latent fingerprints from a package of weiners and a bag of sugar one of the robbers had placed on the check-out counter just prior to the robbery. Also, the police officers had a description of the robber as a black male, between twenty and twenty-five years old, about five feet six inches in height and weighing about a hundred and fifty pounds. (R. 39).

Three weeks after the robbery of Moseley's Grocery Charles Martin was arrested on charges of rape and robbery that had occurred in the same neighborhood. When Taylor confessed, he named Charles Martin as one of his two accomplices in the robbery of Moseley's Grocery. (R. 128). At the time Detective Mobley began to get information from Martin he had not been charged in the Moseley robbery, but was known to Detective Mobley and to other members of the detective division as one of the three suspects in the robbery of Moseley's Grocery. (J.A. 11).

During the week following Charles Martin's arrest Detective Mobley talked to him on several occasions. Martin told the officer that Omar Taylor was one of those involved in the robbery of Moseley's Grocery. (R. 25). He did not tell Mobley how he knew of Taylor's involvement.

Since the probable cause to arrest Taylor was based primarily on the statement of an informant it is necessary to consider the facts in light of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). The finding of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case.

In considering the reliability of the informant it must be noted that this was the first time Charles Martin had given Detective Mobley information. However, there was a genuine basis for belief that the informant, an accomplice to the same crime, was telling the truth. The informant desperately wanted help and had been told by Mobley that

the trial judge would be made aware of his help if his information cleared a case and that the judge could consider this if he so desired. (R. 15). Mobley talked to Martin several times during the week and developed a rapport with him. He impressed upon Martin the adverse consequences of telling a falsehood and impressed upon him the importance of telling the truth. (J.A. 11).

When considering the second prong of *Aguilar*, it is true that the informant never told the officers how he knew that Taylor was one of the three robbers. Here the informant was an accomplice in the Moseley Grocery robbery. Martin was in jail on a different charge, but he was known as a suspect in the same robbery. By knowing Martin as a suspect in the same robbery, the officer could consider the information more than a casual rumor circulating in the underworld. The logical inference from this knowledge was that Charles Martin was speaking as a witness to and as a participant in the crime.

Officer Mobley was convinced of the truthfulness of the information and instructed Detective Alford to arrest Omar Taylor. Alford took Taylor into custody and advised him that he was under arrest for the robbery of Moseley's Grocery. A court may evaluate the knowledge of all officers collectively in assessing police justification for an arrest. *Robinson v. State*, Ala. Cr. App., 361 So. 2d 379, 382 (1978).

Even if the officers arrested Taylor on less than probable cause they acted in a good faith belief that their action was constitutional and such a belief had an objective reasonable basis.

Should the Court find that Taylor was arrested on less than probable cause, the fingerprint evidence and the confession should be admitted into evidence as an exception to the exclusionary rule as set forth in issue two.

C. The Alabama Supreme Court Properly Held Taylor's Confession Was Admissible In Light Of *Dunaway*.

Assuming, arguendo, that this Court determines Taylor's arrest was based on less than probable cause, the

the defendant's confession would be admissible since the taint of his detention was sufficiently attenuated to permit the admission of the incriminating evidence.

The Alabama Court of Criminal Appeals noted that the Appellant did not question the voluntariness of his confession and reviewed the one issue of the admission of the confession in light of *Dunaway v. New York*, 442 U.S. 200 (1979) (J.A. 29). The appellate court found the fact situation to be a virtual replica of *Dunaway* and *Brown v. Illinois*, 422 U.S. 590 (1975) and found the confession inadmissible.

The Alabama Supreme Court reviewed the opinion of the Court of Appeals and reversed the decision upon a finding that any taint of an illegal arrest had been sufficiently attenuated. When the three factors as set forth in *Brown* and *Dunaway* are considered it can readily be seen that the Supreme Court of Alabama ruled correctly.

1. The temporal proximity of the arrest and confession.

In both *Dunaway* and *Brown* the defendant had confessed in less than two hours after his arrest. In the instant case six hours had lapsed and the defendant had been advised of his *Miranda* rights on three occasions. During the afternoon after his 3:00 p.m. arrest Taylor was fingerprinted, processed, and interrogated for about fifteen or twenty minutes. (J.A. 12). He was placed in a lineup shortly thereafter where Mrs. Moseley was unable to positively identify him. After positive identification was made through a comparison of the latent prints and the fingerprint card, Detective Wilson again advised Taylor of his *Miranda* rights and interrogated him. (J.A. 13 and R. 33). The length of this session is not shown in the record. The case was assigned to Detective Hicks and that night he took Taylor out of his cell, read him his *Miranda* rights and had been interrogating him for five or ten minutes when his girlfriend and neighbor appeared and requested to see him. (R. 37).

The exact amount of time that Taylor spent alone in his cell cannot be determined from the record. However, the

majority of the six hour period was spent in the solitude of his cell. The extended period of time is important, for unlike the situation in *Brown* and *Dunaway* where the defendants had confessed before the shock of the arrest had worn off, Taylor had every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will.

2. The presence of intervening circumstances.

In both *Dunaway* and *Brown* there were no intervening circumstances. Prior to confessing the defendant had been read his *Miranda* rights on three different occasions. He had spent several hours alone in the solitude of his cell where he could collect his thoughts. Prior to the confession an independent magistrate had issued an arrest warrant. Taylor had been placed in a lineup and Mrs. Moseley had been unable to identify him. It would certainly be a confidence builder for a person who had committed an armed robbery to face his victim and find that the victim was unable to identify him. Such an event would tend to lessen the shock of his arrest.

The Alabama Supreme Court properly emphasized the private meeting between Taylor, his girlfriend, and Charles Williams, a friend and neighbor. The police officers had nothing to do with Omar Taylor's choice of friends. The meeting was initiated by his girlfriend, who appeared on the scene with Taylor's friend and neighbor, Charles Williams. (R. 133). During the suppression hearing Detective Hicks explained on cross-examination what happened as follows: (R. 35).

"Q. At that point, you indicated to him that we have your girlfriend outside and we would like her to talk to you about it?
A. No, sir, we did not.
Q. Tell us what happened.
A. His girlfriend came to us and said she wanted to talk to Omar, and we told Omar she was outside

and he wanted to talk to her. And at that time, we let him talk to her."

There was a conflict between the testimony of Taylor and Detective Hicks relating to the circumstances surrounding the meeting between Taylor and his friends. Such a conflict in testimony must be resolved by the trial judge. *McBryar v. State*, Ala. Cr. App., 368 So. 2d 568 (1979). Here the conflict in testimony was resolved in favor of the State.

According to the testimony of Detective Hicks, Taylor was being interrogated in a detective's office when Taylor's girlfriend and Charles Williams arrived in the hall. (R. 133). Hicks describes what happened in his testimony as follows: (R. 136).

Q. Now, who first mentioned the prospect of Omar Taylor seeing his girlfriend?
A. His girlfriend did.
Q. Did he say anything to you about that?
A. I told him that his girlfriend was outside, and he said he would like to talk to her.
Q. And you permitted that?
A. Yes, sir.
Q. Were they permitted to speak privately?
A. Yes, they were.
Q. Whereabouts?
A. In the detective office.
Q. Was any other police officer in there with them?
A. No, sir.

3. The purpose and flagrancy of the official misconduct.

The conduct of the police differs greatly from the action of the police in *Dunaway*, *Brown*, and *Davis v. Mississippi*, 394 U.S. 721 (1969). In *Davis* the only description the officers had of the rapist was that he was a Negro youth. The officers then in a dragnet operation picked up, fingerprinted, and interrogated twenty-four Negro youths in an absence of probable cause. In *Brown* the defendant was identified only as an acquaintance of the victim, not as a

suspect. The officers broke into his apartment, searched it and then arrested the defendant without probable cause and arrested Brown in such a manner that was calculated to cause surprise, fright, and confusion. In *Dunaway* the arrest of a teenager was purely investigatory and the officers maintained Dunaway had not been arrested but merely detained. He was never told he was under arrest. The lead was supplied by a jail inmate who was not shown to be connected to the crime in any manner.

In the instant case the information was obtained from Charles Martin, whom Omar Taylor later identified in his statement as one of his accomplices. (R. 128). At the time Martin talked to the officers, he was known to them as a suspect in the Moseley Grocery robbery. Even though the reliability of the informant might not have been established, the police officers had good reason to believe that he was speaking as a participant in the robbery. Also, the officers knew that Martin desperately wanted help in exchange for reliable information. They had information, a detailed description of the robber, and a set of latent prints from the crime scene. Unlike the situation in *Brown*, *Davis*, and *Dunaway* the investigation focused on one individual who was arrested in the middle of the afternoon at a public place and who was immediately told that he was under arrest for the crime for which he was convicted. The action of the police in the instant case cannot be termed a flagrant disregard for constitutional rights. Even though the sum total of probable cause might not meet the technical standard of probable cause, the police acted with a good faith belief that they were acting within the law and there was an objective reasonable basis for such a belief.

II.

IF THIS COURT SHOULD FIND THAT PETITIONER'S FINGERPRINTS AND CONFESSION WERE SUBJECT TO SUPPRESSION UNDER THE RULE IN *DUNAWAY*, SUCH EVIDENCE SHOULD BE ADMISSIBLE AS AN

EXCEPTION TO THE EXCLUSIONARY RULE AS THE POLICE ACTED IN AN OBJECTIVE GOOD-FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

If this Court should find that Petitioner's fingerprints and confession evidence was otherwise inadmissible, it should be admissible as the police acted in an objective good-faith belief that their conduct was proper and such belief was grounded in an objective reasonableness. For the reasons set forth in this brief, set forth in the opinion of the Alabama Supreme Court, and set forth in the brief of Amici Curiae in support of Respondent's position, Respondent asks this Court to modify the exclusionary rule to include an objective good-faith exception as set forth in *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980).

In *Williams* the rule was stated by the Fifth Circuit Court of Appeals sitting *en banc* as:

> "Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence." 622 F. 2d 830, 846-847.

As enumerated in *Williams* at page 841, there are two basic types of good faith violations where the officers fail to meet the requirement of probable cause. The first type is characterized as a "good-faith mistake" where the officers make a judgmental error concerning the existence of facts sufficient to constitute probable cause. The instant case could fit within this category. If Omar Taylor was arrested on less than probable cause, the officers did nothing more than make a good-faith mistake, for their belief was grounded on objective reasonableness.

The other type of good-faith violation was termed as "technical violation" and applied to instances "where an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court

precedent which is later overruled." *Williams*, supra. The officer in *Williams* acted in good-faith belief that he had authority to arrest the defendant in accordance with a valid statute which was later construed differently.

In the previous decisions of this Court there has already been a recognition of the principle of good-faith reliance in the "technical violation" facet of the good faith exception. In *United States v. Peltier*, 422 U.S. 531, (1975), this Court admitted evidence seized in a good faith-border search under a statutory construction that was subsequently held unconstitutional. This Court refused to apply newly announced doctrines of search and seizure law retroactively and stated:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. *Peltier*, supra, at 537.

Also, in *Michigan v. DeFillippo*, 433 U.S. 31 (1979) this Court admitted evidence seized in a good-faith warrantless arrest based on probable cause for violation of a law later declared unconstitutional. A search of the defendant's person made incident to the arrest resulted in the seizure of drugs. This Court held that DeFillippo's arrest made in a good-faith reliance on a Detroit ordinance, though later declared unconstitutional, was valid regardless of the subsequent judicial determination of its unconstitutionality.

In *United States v. Janis*, 428 U.S. 433, 434, 454 (1976) this Court answered the following question in the negative "Is evidence seized by a state criminal law enforcement officer *in good faith, but nonetheless unconstitutionally*, inadmissible in a civil proceeding by or against the United States?" (Emphasis Respondent's). This Court found that exclusion of the evidence unlawfully seized was not "shown

to have a sufficient likelihood of deterring the state police so that it outweighs the societal costs imposed by the exclusion."

Where official police action is pursued in complete good faith the deterrence rationale loses much of its force. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

The good-faith exception to the exclusionary rule as set forth by the Court in *Williams* is limited in scope. The belief of the officer must be more than a subjective belief. His good-faith belief must be grounded in an objective reasonableness. "It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully." *Williams*, at page 841.

In evaluating the justification for the adoption of a good-faith exception to the exclusionary rule, it is not necessary to trace the history of this rule. A comprehensive history of and discussion of the rule is found in the opinion of the Alabama Supreme Court (J.A. 37). *Taylor v. State*, 399 So. 2d 881 (Ala. 1981).

In *Weeks v. United States*, 232 U.S. 383 (1914) it was held that evidence seized by federal agents in violation of the Fourth amendment was inadmissible in federal court. Forty-seven years later the exclusionary rule was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The exclusionary rule was defined in *United States v. Calandra*, 414 U.S. 338, 347, (1974), as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." The exclusionary rule is not in itself a requirement of the Constitution, but is a judicially created means of effectuating the rights secured by the Fourth Amendment. *Stone v. Powell*, 428 U.S. 465, 482 (1976).

The primary justification for the exclusionary rule is the need for deterrence of illegal police conduct. *Stone v. Powell*, at 486; *Calandra*, at 347.

In *Calandra* this Court further stated:

"Despite its broad deterrent purpose, the exclusion-

> ary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficiously served." 414 U.S. 338, 348.

The same authority that empowered this Court to supplement the Fourth Amendment with the exclusionary rule a hundred and twenty-five years after its adoption allows this Court authority to modify this judicially created remedy. Through the adoption of the objective good-faith exception to the exclusionary rule some of the harshness and injustice of the rule could be removed.

A valid criticism of the rule has been that honest mistakes by police officers are treated in the same way as deliberate flagrant violations of the Fourth Amendment. As applied now the rule is "a mechanically inflexible response to widely varying degrees of police error. . . ." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). The opinion of the Alabama Supreme Court reflected this same criticism by stating: (J.A. 49) *Taylor v. State*, 399 So. 2d 881 (Ala. 1981):

> Furthermore, the exclusionary rule "fails to discriminate between the degrees of culpability of the officer or the degree of harm to the victim of the illegal search and seizure." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 225-26 (1978). Regardless of whether there is a mere technical violation, such as a defective warrant, or a gross violation of the fourth amendment, such as was seen in *Mapp v. Ohio*, 367 U.S. 643 (1961), the penalty is the same; the evidence is excluded. Wilkey, supra, at 226.

Exclusion of evidence seized without any probable cause in a flagrant disregard for the Fourth Amendment is an entirely different question from the suppression of evidence seized in an objective good-faith belief that probable

cause exists, and such belief is grounded on objective reasonabliness. Society has paid a high price for the exclusionary rule. Some of the harshness and injustice of this rule could be mitigated by recognizing the extremes of police misconduct.

This idea was expressed recently in the Attorney General's Task Force On Violent Crime as follows:

> We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution.

Attorney General's Task Force on Violent Crime, 29 C.r.L. 3131, 3134 (1981).

Valid criticisms of the exclusionary rule can readilty be illustrated by Omar Taylor's case. In reversing the conviction of the trial court, the Alabama Court of Criminal Appeals stated: (J.A. 34-35) *Taylor v. State*, 399 So. 2d 875 (Ala. App. 1981):

> We are loath to reverse a case where the guilt of the accused is so clear and convincing and the guilt drips from the fingers of both hands, but our path is lighted in *Dunaway* and we are bound to follow this path.

So often the result of the exclusionary rule has been to suppress the truth and set the criminal free. The question as to why the criminal should go free when the constable has blundered has been asked many times, but it has never been satisfactorily answered. When the general public sees armed robbers, rapists, drug pushers, murderers, and all manner of criminals escape punishment on what the public terms "a technicality", society loses respect for the judicial system.

In his dissent in *Kaufman v. United States*, 394 U.S. 217, 237 (1969) Mr. Justice Black stated:

> A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

Taylor's case clearly illustrates the suppression of the truth. One of the two evidentiary items sought to be excluded in Omar Taylor's case was his fingerprint comparison. Fingerprinting is inherently more reliable than eyewitness identification. In suppressing the truth the courts lose sight of what should be the ultimate question — the guilt or innocence of the defendant. The truth is suppressed and the guilty go free regardless of whether there is an objective good-faith mistake or a flagrant violation of constitutional rights by the officer. In *Stone v. Powell*, 428 U.S. 465, 490 this Court stated:

> Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Police officers are not attorneys. These public servants have taken an oath to uphold the law and protect society. In the reality of every-day law enforcement they will make mistakes. Their action is often termed a "mistake" by a 5 to 4 margin by judges skilled in legal knowledge. One court may find their action within the law and a reviewing court reach the oppositive conclusion.

The mistakes made by the law enforcement officers, however, vary from good-faith mistakes to flagrant violations of constitutional rights. Where the officers have acted in complete good faith the deterrence rationale loses much

of its force, and this is the primary justification for the exclusionary rule. An officer cannot be deterred when he believes in good faith that his action is correct.

The Fifth Circuit Court of Appeals sitting *en banc* in *United States v. Williams*, 622 F. 2d 830, 842 cited Judge Clark's dissent to the panel opinion as it set forth so clearly the relationship between the deterrence rationale of the exclusionary rule and an objective good-faith mistake on the part of an officer. Judge Clark stated:

> No proper deterrent effect is accomplished by the suppression of the evidence in this case. Field officers are seldom trained as legal technicians. Even those who are may have mistakenly thought that Officer Markonni's arrest was proper. Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

Those who would oppose the adoption of an objective good-faith exception to the exclusionary rule would argue that such would constitute an erosion of constitutional rights. Such an argument is without merit as the rule is judicially created and does not co-exist with the Fourth Amendment. Also, the underlying purpose would remain — to deter bad-faith police conduct that could be termed flagrant violations.

Society has paid too high a price for the exclusionary rule. If the rule must be applied then in the interest of justice, it should be made flexible and take into consideration the degree of mistake the officer has made and weigh this against the windfall afforded a guilty defendant.

CONCLUSION

For the reasons set forth in this brief, in the opinion of the Alabama Supreme Court, and in the brief of Amici Curiae in support of Respondent, if this Court should otherwise find the evidence in this case inadmissible under the exclusionary rule, this Court should find that evidence admissible as an objective good-faith exception to the exclusionary rule.

Respectfully submitted,

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